

The Legal Framework of Green Governance in Archipelagic State Based on Constitution of The Republic of Indonesia

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Abstract-Indonesia was an archipelagic state that characterized by nusantara affirmed in Article 25A, constitution of the republic of Indonesia, Undang-Undang Dasar Negara Republik Indoensia (UUD NRI 1945) in chapter IXA which explains the territory of the country. This had two consequences, first, that sovereignty over the territory of Indonesia was based on the concept of an archipelagic state as stipulated in the United Nations Convention on the Law of the Sea 1982(UNCLOS 1982). Secondly, legal politics towards national development should be based on the concept of an archipelagic state that was insightful to nusantara. In this study, the emphasis was on the second consequence, namely national development that had nusantara insight, especially in matters of government that had principles green governance in carrying out their authority. The principle of green governance was actually inseparable from the green constitutional framework contained in the UUD NRI 1945, then it became a basic reference in formulating the legal framework green governance in government. This research also provided new ideas about coherence between green governance and the concept of an archipelagic state, it was very necessary to create sustainable development in Indonesia. Because without regard to the territorial characteristics of a country, this would create gaps and difficulties in implementing them in real terms. This research used legal research methods, with two approaches, namely statute approach, and conceptual approach.

Keywords-legal Framework, Green Governance, Archipelagic State, Sustainable Development

I. INTRODUCTION

Republic of Indonesia guarantees its citizens to obtain good and healthy environmental rights, this is confirmed in Article 28H of Constitution of the Republic of Indonesia (UUD NRI 1945). Jimly Asshiddiqie then stated that the norm is a characteristic that Indonesia adheres to the concept of green constitution, namely the existence of environmental sovereignty. The environmental sovereignty in question is putting the environment as a subject to be maintained and preserved.

Article 33 paragraph (4) of the UUD NRI 1945, actually also regulates the importance of paying attention to the environment in the implementation of the national economy. Based on these provisions, economic democracy must contain two principles, namely: the principle of sustainable development and pro-environment. The principle of sustainable development,

as also in the Rio Declaration meant that environmental protection is an inseparable part in the framework of carrying out the development process. Whereas environmental insight, it is intended that there are conscious and planned efforts that integrate the environment in all fields in each development process.[1]

This was followed by the emergence of regulations that obliged the government and citizens to keep their environment good and healthy, so that they could continue to be sustainable for the next generation of the nation. Law Number 32 of 2009 concerning Protection and Management of the Environment (Law 32/2009) embodies the mandate of the constitution by making legal norms in Article 65 paragraph (1) and (2) that everyone has equal rights, and has access to justice in fulfill the right to a good and healthy environment. The existence of legal norms in laws that have adjusted to the green constitution which regulates the fulfillment and justice of a good and healthy environment, can be called green legislation. In Article 44 of Law 32/2009 it is clear that, "Every formulation of legislation at the national and regional levels must pay attention to the protection of environmental functions and the principles of environmental protection and management in accordance with the provisions stipulated in the Law." [2]

Green constitution and Green legislation owned by Indonesia will not run well when the government as the government organizer does not have a green governance understanding. Green governance is a government policy that pays attention to sustainable development and pro-environment. Another term about green governance is good environmental governance, that all stakeholders must pay attention to environmental factors in each of their policies. The definition of governance not only covers the government, but also other supporting factors, for example, the community, and the company. According to the State Administration Institute the notion of governance includes 3 things, namely: economic, politic, and administrative. [3]

In data taken from the site www.greenpeace.org many cases of civil lawsuits caused by plantation companies were not followed up explicitly by the government. Data stated that forest fires ranged from 2012 to 2015, which in the court ruling ordered compensation and environmental restoration totaling 2.7 trillion rupiah. Deputy Chair of the

Corruption Eradication Commission, Laode M. Syarif in the discussion of the National Movement for the Rescue of Natural Resources on July 16, 2019 stated that there was an irregularity in the mining permits that are more outside of the land in East Kalimantan. The data shows that even though Indonesia has green constitution, as well as green legislation. Without being followed by a green maintenance, it will not be meaningful, the law is only used as a means of legitimizing power. [4]

The law will not be a leader if it is between das sollen, with das sein not coherent. For this reason, development efforts must continue to be made so that the law can carry out its role and function as a guideline for behaving together, as well as guarantor of justice for the community. Another reason for legal development is that the law does not stop at the vacuum area, where the law always follows the development of its society. In addition, as a driver of society's progress, and to make the law effective so that it is not manipulated and used as a tool by the authorities. [5]

The application of Green governance in Indonesia, needs to pay attention to the territorial dimensions that Indonesia has, namely Indonesia as an archipelago. Geographically, the Indonesian archipelago is located between $5^{\circ} 54' 08''$ north longitude to $11^{\circ} 08' 20''$ south longitude and $95^{\circ} 00' 38''$ to $141^{\circ} 01' 12''$ east longitude. The size of the oceans owned by Indonesia, the administration of the government needs to accommodate each policy. The ideal government administration for Indonesia is berbasis based on an archipelagic state characterized by Nusantara, it is based on the provisions of Article 25A UUD NRI 1945 that "the Unitary State of the Republic of Indonesia is an archipelagic state characterized by an archipelago with territories and rights stipulated by law". The legal norms contained in Article 25A UUD NRI 1945 according to Prof. Jimly Asshiddiqie has the meaning that first, Indonesia as an independent and sovereign country has its own jurisdiction. Second, confirmation that the determination of territory covering boundaries and rights is regulated in the form of law. And third, the determination of boundaries and their rights relating to the region, must fulfill the rules in the provisions of international law. (J. Asshiddiqie, 2002) The provisions of international law intended are certainly the provisions of the 1982 United Nations Convention on the Law of the Sea (1982 Law of the Sea Convention). Based on Article 46 paragraph (1) of the 1982 Sea Law Convention, the State of Indonesia is classified as an archipelagic state, which means that an archipelagic state is a country consisting entirely of one or more islands and can cover other islands.

Indonesia is the archipelagic state as stated in Article 25A UUD NRI 1945, not only confirms that Indonesia is an archipelagic state as well as the archipelagic state of the 1982 Sea Law Convention. The founding constitution of UUD NRI 1945 provide more emphasis on the concept of an archipelagic state that is archipelagic

state characterized by Nusantara. The words "characterized by Nusantara" certainly have a meaning believed to be different by founding UUD NRI 1945 without giving these words. Moreover, these words are part of a formulation of legal norms contained in the constitution, which certainly has legal consequences in the administration of constitution. In accordance with the theme above, this research focuses on What is the legal framework for green governance in archipelagic state based on constitution?

II. RESEARCH METHOD

This study uses legal research methods. Legal research is conducted to produce new arguments, theories or concepts as prescriptions about what should be done in solving the problem at hand. The expected answers in legal research are right, appropriate, inappropriate, or wrong, so the results obtained in legal research already contain value. [6] In legal research always uses an approach, from this approach the researcher will get information and various aspects regarding legal issues that are being studied to get the answer. The approaches used in this study are conceptual approach, and statute approach.

III. FINDINGS AND DISCUSSION

Green governance legal framework/good governmental governance is built from the constitution which is the fundamental norm of legislation. This is because Indonesia adheres to the hierarchy of Hans Kelsen's legal norms. According to Hans Kelsen, the hierarchy of legal norms consists of (i) fundamental norm found in constitution, (ii) general norms, found in statue or legislative act, (iii) concrete norms, found in *vonnis*. [7] A constitution provides a framework of rules that creates the structure and function of human organization. According to A.V. Dicey constitution is all rules which directly or indirectly affect the distribution and exercise of the sovereign power in the state. Marshall a political theorist say that constitution is the combination of legal and non-legal rules that currently provide the framework of government and regulate the behavior of the major political actors. [8]

UUD NRI 1945 has accommodated and laid down the basic concept of sustainable development and the environment. By having constitutionalized the legal norms towards sustainable development and the environment, then it can then become a control of the legislation, both constitutional review and legal review. Legal review of any suspected abstract and general norm (*regeling*) or concrete and individual norms (*beshicking*) deviations. [9] Constitutional review can be done on policy making, rule-making, and policy executing or rule enforcement. [10]

Jimly Asshiddiqie says that some countries that have included provisions on the environment in the constitution

are divided into four groups, namely, first, countries whose constitution contains specific provisions on environmental protection, the state in the first group is Spanish constitution. Secondly, a country whose constitution integrates provisions regarding the environment in provisions concerning human rights, the country in this second group is Poland. Third, countries whose constitution only regulates the environment implicitly or determines guarantees of certain human rights used for protection of the environment in practice, Indonesia can be classified into this third group of countries. And fourth, the constitutional state associates an outline of certain environmental policies with the duties or responsibilities of certain state institutions to preserve the environment and prevent damage to nature, the country in this group is Portugal. Then Jimly Asshiddiqie gave the term country which has an arrangement for environmental problems known as green constitution. [11]

The Indonesian economic development orientation can be analyzed in Article 33 of the UUD NRI 1945. The classula in Article 33 paragraph (4) namely "the national economy is based on economic democracy with the principle of togetherness, fairness, sustainability, environmentalism, independence, and by maintaining a balance of progress and the unity of the national economy." This shows that the national economic development and social welfare of the Indonesian state explicitly assert that it is carried out in a sustainable and environmentally sound manner, which means that it is intended as sustainable and pro-environment development as the soul of the government carrying out national economic development.

Article 33 paragraph (4) is certainly related to paragraph (3) of the article. That national economic development covering the earth and water and the natural wealth contained in it must be used for the greatest prosperity of the people and pay attention to the principles contained in paragraph (4) which of course there are principles of sustainability and environmental insight. So when the government in carrying out economic development does not pay attention to sustainable development and pro-environment, the government is violating the constitution.

Article 33 paragraph (5) UUD NRI 1945 then stipulates that further provisions regarding the implementation of Article 33 as a whole, in this case include the national economy which must be in accordance with the principles of sustainable and environmentally-oriented law. This means that the constitution has provided a mandatory law to regulate as stipulated in the constitution. According to Mian Khurshid A. Nasim, when a statute is passed for the purpose of enabling something to be done, it must be fulfilled or exact, it is a mandatory enactment. Mandatory enactment is not strictly complied with, the thing done will be invalid. [12]

Article 28H Paragraph (1) UUD NRI 1945 has also constituted the norms of the environment, this norm has at the same time strengthened that Indonesia adheres to green constitution. The legal norm contained in the article is "Every person has the right to live in physical and spiritual prosperity, to live, and to get a good and healthy environment and the right to receive health services". The right to get a good and healthy environment is the duty of the state to fulfill, moreover that right is also part of universal human rights in the third generation. The state can be complained by citizens if there is a violation of the constitutional rights of citizens.

Protection of constitutional rights can be taken through two mechanisms, namely judicial or non-judicial. Forms of protection of constitutional rights adopted through judicial mechanisms can be grouped into: (i) through constitutional court, (ii) administrative court, (iii) general court, (iv) human rights court. Complaints through the constitutional court based on its function are first, testing constitutionality to the law, the object being the legislative product. Second, constitutional complaints that become the object are public officials' acts or omissions which result in violations of whether constitutional rights are violated or not.

Complaints through administrative courts, according to Article 1 number 4 of Act Number 5 of 1986 concerning Administrative Courts, are disputes arising in the field of state administration, between people or civil legal entities with State Administration Offices or Bodies, both in the Central Government or regional government, as a result of the issuance of state administrative decisions. State Administrative Decisions, namely written stipulations issued by State Administration agencies or officials that contain state administrative legal actions based on applicable legislation, which are concrete, individual and final, which give rise to legal consequences of a person or civil legal entity. In this state administrative decision, it can be seen that a state administration agency or official applies or does not apply the principles of green governance / good environmental governance. [13]

Protection of constitutional rights through public courts has become a necessity in legal practice, both in the field of civil or criminal. This cannot be separated from law enforcement on the environment. In addition to the judicial mechanism, there is a non-judicial mechanism in which one of them can be resolved through the ombudsman. The Ombudsman is a state institution that has the authority to oversee the implementation of public services, both held by state officials and the government, including those held by state-owned enterprises, regionally owned enterprises, and state-owned legal entities, as well as private entities or individuals who are given the task of organizing certain public services which part or all of their funds are sourced from the State Expenditure Budget or the Regional Expenditure Budget. The Ombudsman will oversee the actions taken by users of the state or regional budget in accordance with the law.

If there are indications of violating the law, it will be classified between personal responsibility and job responsibility. Personal responsibility regarding maladministration in the use of authority in public services. Whereas office responsibilities are related to the legality of government actions based on the principle of legality or *rechtmatigheid*. [14] [15]

Article 33 paragraph (4) and 28H constitute the constitutional legal framework of sustainable government and pro-environment. The two norms show a characteristic that the Indonesian constitution is green constitution. These legal norms are adopted into several laws and regulations. One of them is Law Number 32 of 2009 concerning Environmental Protection and Management. Article 1 paragraph (3) provides a definition of development, namely conscious and planned efforts that integrate environmental, social and economic aspects into development strategies to ensure the integrity of the environment, as well as the safety, ability, welfare and quality of life of present and future. Then in Article 3 letter g states: "Protection and management of the environment aims to ensure the fulfillment and protection of the rights to the environment as part of human rights."

Law No. 32 of 2009 seems to have given the view that besides adopting green constitution, Indonesia also has green legislation. Legislation that has a green nuance will be the legal basis for the establishment of green governance that is realized and the form of public policy. However, the law has weaknesses, especially incoherent with other laws governing the earth and water, and the natural wealth contained therein (forests, mines, minerals and coal, plantations, spatial planning). The many diverse regulations (including the Law on the field of natural resources) have become obstacles. Moreover, the weak regulatory position that applies or its binding power cannot be forced in the face of the rules contained in the laws governing other sectors.

Green governance in an archipelagic state that characterized by nusantara is based on clear environmental management arrangements. According to Siti Sundari Rungkuti, the requirement to implement environmental policy (green governance) is the development of robust legislation, carefully prepared by calculating the element of integration in the regulatory system, so that its effectiveness can be maximally achieved. [16]

In view of environmental law, a statutory regulation that regulates the environment will be able to demonstrate its functional role, if the formulation is based on principles of environmental policy. Siti Sundari Rungkuti constant principles of environmental policy, namely: (i) Abatement at the source; (ii) Best practicable means/ best technical means; (iii) Polluter pays principle; (iv) Stand still principle; (v) Principle of regional differentiation; and (vi) "*Het beginsel van de omkering van de bewijslast*" principle. [17]

IV. CONCLUSION

The State of Indonesia based on Article 33 paragraph (4) and 28H UUD NRI 1945 has shown that sustainable development and pro-environment have been constitutionalized so that the Indonesian constitution has a green nuance. The two legal norms have legal consequences that the rules under UUD NRI 1945 must be coherent, the law products that have also been pro-environment can be categorized as green legislation. The green governance legal framework is derived from what has been regulated in the constitution and law. The characteristics of Green governance include: (i) participatory; (ii) consensus oriented; (iii) accountable; (iv) transparent; (v) responsive; (vi) effective and efficient; (vii) equitable and inclusive; and (viii) the rule of law. And the concept of green governance in Indonesia should be based on archipelagic state that characterized by the archipelago, because Article 25A UUDNRI 1945.

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